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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1303

CARL D. BISHOP, *Petitioner,*

v.

W. H. WOOD, *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE FOR THE COALITION OF AMERICAN PUBLIC EMPLOYEES

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BRIEF AMICUS CURIAE FOR THE COALITION OF AMERICAN PUBLIC EMPLOYEES

INTEREST OF AMICUS[1]

The Coalition of American Public Employees ("Coalition") is an association of organizations, each of which endeavors to advance the interests of employees in their respective fields through collective bar-

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

gaining and/or other means. The Coalition's constituent organizations and their memberships are as follows:

The *National Education Association ("NEA")* is the largest teacher organization in the United States, with a membership of approximately 1.7 million educators, most of whom are teachers in public educational institutions.

The *American Federation of State, County, and Municipal Employees ("AFSCME")*, AFL-CIO, has approximately 750,000 members who are employees of state and local governments.

The *National Treasury Employees Union ("NTEU")* represents approximately 95,000 non-supervisory employees of the United States Department of the Treasury.

The *American Nurses' Association ("ANA")* represents 205,000 members, many of whom are employees in state and local governmental institutions.

The *Physicians' National Housestaff Association ("PNHA")* has a membership of approximately 18,000 physician housestaff officers, predominantly interns and residents, many of whom are employees of state and local institutions.

The *National Association of Social Workers ("NASW")* represents 64,000 members, many of whom are employees at the state and local government levels.

In all, the Coalition represents approximately three million public employees who are members of the constituent organizations, and approximately two million other public employees who are non-members protected by collective bargaining agreements negotiated in their behalf.

The public employees represented by the Coalition and its constituent organizations have a direct interest in decisions of this Court which may determine and further define the extent to which procedural due process protects public employees who face discharge. In light of this interest, the Coalition submitted a brief amicus curiae in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), and does so here for the purpose of demonstrating that the summary discharge of petitioner, a police officer, abridged liberty and property interests protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I. Introduction and Summary

In the case at bar petitioner, Carl A. Bishop, was discharged for cause from his employment as a police officer for the City of Marion, North Carolina. The city officials, as the district court found, did not afford Bishop a hearing or other rights of due process, though Bishop vigorously urged that the ostensible grounds relied on by the city officials in discharging him were contrary to fact. Whether Bishop was entitled to a full and fair determination of the truth or falsity of the allegations and charges relied upon by Marion officials turns upon the issues whether the city officials' action abridged a "liberty" or "property" interest protected by the due process clause. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974).

On the parties' cross motions for summary judgment, the district court concluded as a matter of law that Bishop did not possess a property interest and that

there had been no deprivation of his liberty. A panel of the court of appeals affirmed "on the opinion of the district court," and Circuit Judge Winter filed a dissenting opinion (Pet. App. 26).[2] Thereafter the court of appeals, sitting en banc, affirmed the district court's judgment by an evenly divided vote (*id.* at 30).[3]

We show below that the court of appeals erred in affirming the district court's order granting summary judgment for respondents, because Bishop was entitled to procedural due process on two grounds. First, Bishop held a legitimate claim of entitlement to continued employment absent cause. The Marion Personnel Ordinance conferred upon him the status of a permanent employee and set forth the causes for which such employees may be discharged. Second, respondents' action in summarily discharging Bishop for cause —*i.e.*, on grounds of "insubordination" and conduct "unsuited to a police officer"—constituted state action that could seriously stigmatize petitioner and could seriously interfere with his career prospects as a police officer. In short, respondents' action in summarily discharging Bishop for cause abridged "property" and "liberty" interests secured to Bishop by state law and the Fourteenth Amendment.

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[2] Citation is to the appendix attached to the petition for certiorari. This appendix contains all opinions and orders of the district court and the court of appeals. Other record materials are contained in the principal "Appendix" which is cited herein as "A" followed by the appropriate page reference.

[3] There are seven active or regular judges on the Fourth Circuit. Evidently the evenly divided vote of the court sitting en banc resulted from the fact that Senior Circuit Judge Bryan was a member of the original panel which heard this case and thus was eligible to sit as an eighth member of the court on rehearing en banc.

II. The Courts Below Erred in Concluding that Petitioner Does Not Possess a Legitimate Claim of Entitlement to Continued Employment Absent Sufficient Cause.

This Court has thrice concluded that, when a public employee possesses a "legitimate claim of entitlement to continued employment absent 'sufficient cause,'" he has a "property" interest which is subject to and protected by due process. *Perry* v. *Sindermann,* 408 U.S. 593, 602-03 (1972); *Board of Regents* v. *Roth,* 408 U.S. 564, 577-78 (1972); *Arnett* v. *Kennedy,* 416 U.S. 134, 166, 185, 208-09 (1974) (concurring and dissenting opinions respectively of Powell, White, and Marshall, JJ.). See also, *Goss* v. *Lopez,* 419 U.S. 565, 573 (1975). We show below that the Fourth Circuit erred in concluding that petitioner does not possess a legitimate claim of entitlement to continued employment absent sufficient cause.

First we discuss the reasons stated by the district court for its conclusion that Bishop does not have a property interest or claim of entitlement to continued employment. We necessarily focus on the district court's opinion for it is the only written explanation of the judgment below. The district court concluded that all procedures embodied in the ordinance creating Bishop's property interest had been complied with and thus Bishop had no property interest that is protected by the due process clause. We show that this analysis of "property" was rejected by six members of this Court in *Arnett, supra.*

Next, we show that Bishop possessed a legitimate claim of entitlement to continued employment, for he was, as the district court found, a nonprobationary employee. Pursuant to Article II of Marion's Personnel Ordinance, such employees are "permanent em-

ployees" who may be discharged, if at all, for the specific "causes" set forth in that ordinance. *Arnett* v. *Kennedy* and its antecedents make clear that such statutory provisions establish the requisite property interest for invoking the protections of procedural due process.

A. The District Court's Legal Analysis of Bishop's Property Interest Was Rejected by Six Members of This Court in Arnett.

The district court concluded that Bishop "had no tenure" or other property interest in continued employment (Pet. App. 22). In reaching this conclusion, the district court looked to two sources of state law that might create a property interest—the law of contracts and the Marion Personnel Ordinance. With respect to contract law, the district court held that "[u]nder the law in North Carolina, nothing else appearing, a contract of employment which contains no provision for the duration or termination of employment is terminable at the will of either party irrespective of the quality of performance by the other party" (Pet. App. 18). In this connection, the court found that "[t]here was no written contract of employment [between Bishop and respondents], nor was there any agreement as to the terms of such employment" (Pet. App. 13).[4]

The district court then turned to Article II, Section 6, of the Personnel Ordinance of the City of Marion, which provides:

> "*Dismissal.* A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice" (Pet. App. 14).

[4] We do not discuss this point further since Bishop's clearest entitlement to continued employment arises from Marion's Personnel Ordinance.

The district court stated that the ordinance had been "complied with" and that it "does not require a notice or hearing," and ultimately concluded that "the city had not created by regulation or policy, any condition in which its employees could expect continued employment" (Pet. App. 19, 22).[5] Thus, as we understand it, the district court reasoned that Bishop's job security was limited to and defined by the minimal statutory procedures governing dismissals (written notice and a statement of reasons) and, as so limited, did not constitute a "property" interest protected by the due process clause.

Similar reasoning was advanced by three members of this Court in *Arnett* v. *Kennedy*, 416 U.S. 134, 155 (1974) (Opinion of Rehnquist, J.), and was rejected

[5] In support of its decision, the district court cited (Pet. App. 19-21) three cases decided before *Perry* v. *Sindermann* (*Still* v. *Lance*, 279 N.C. 254 (1971); *Hodgin* v. *Noland*, 435 F.2d 859 (4th Cir. 1970); and *Brown* v. *Hirst*, 443 F.2d 899 (4th Cir. 1971)), and two post-*Sindermann* cases presenting the issue whether non-tenured teachers were entitled to procedural due process when the employer allowed their contracts to expire without renewal (*Chitwood* v. *Feaster*, 468 F.2d 359 (4th Cir. 1972); and *Kota* v. *Little*, 473 F.2d 1 (4th Cir. 1973)). None of the plaintiffs in these cases were protected by a statute that creates a class of permanent employees and establishes the grounds for discharging such employees.

by a majority of the Court.[6] The statute before the Court in *Arnett*, the Lloyd-LaFollette Act, provided that certain classes of federal employees could be dismissed only for cause, established procedures for such dismissals, and expressly withheld, subject to agency discretion, the right to a hearing. 5 U.S.C. § 7501. The plurality opinion concluded that the Fifth Amendment's due process clause does not limit "Congress in the manner in which benefits may be extended to federal employees" (416 U.S. at 151) and that "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest" (*id.* at 155).

Six Justices, however, rejected this analysis and concluded that the statutory procedures for discharge did not curtail or limit Kennedy's statutory entitlement to continued employment absent sufficient cause (*id.* at 166-67, 177, 210-11 (Opinions of Powell, J., joined by Blackmun, J.; White, J.; and Marshall, J., joined by Douglas and Brennan, JJ.)). As Mr. Justice White stated: "While the State may define what is and what is not property, once having defined those rights the Constitution defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition" (*id.* at 185; see also Marshall, J., at 211). Thus, the district court's reasoning, which was adopted by a majority of the

[6] *Arnett* was decided after the original panel of the Fourth Circuit heard oral argument but before it decided Bishop's appeal. Evidently the panel was unaware of *Arnett* for two members of the panel adopted the district court's opinion and Judge Winter's dissenting opinion makes no reference to *Arnett* (Pet. App. 25-29).

original panel of the court of appeals, is contrary to the conclusion of a majority of this Court in *Arnett*.[7]

B. The Ordinance Created for Nonprobationary Employees Like Bishop a Property Interest in Continued Employment.

While Marion's Personnel Ordinance did not establish procedures sufficient to satisfy the due process clause, it did, as we show below, define and establish a property interest in continued employment that is subject to and protected by the due process clause.

The Police Department of the City of Marion, as a matter of practice, places newly hired policemen on a six-month probationary period (A.19 24; Pet. App. 13). Bishop satisfactorily completed that probationary period and thereafter, as the district court found, he became a "permanent" employee of the City of Marion (Pet. App. 13).[8]

[7] In the wake of *Arnett*, the lower courts have routinely held that, in determining whether a public employee is entitled to due process, the employee's property right is not conditioned or limited by statutory procedures falling short of due process. *Oppenheimer Mendez* v. *Acevedo*, 388 F. Supp. 326, 334 (D. Puerto Rico, 1974), *aff'd*, 512 F.2d 1373 (1st Cir. 1975); *Eley* v. *Morris*, 390 F. Supp. 913, 920 (N.D. Ga., 1975); *Young* v. *Hutchins*, 383 F. Supp. 1167, 1178, n.15 (M.D. Fla., 1974); *Snead* v. *Department of Social Services*, 389 F. Supp. 935 (S.D. N.Y., 1974) (3-Judge Court), vacated and remanded for consideration of mootness, 421 U.S. 982 (1975).

[8] In our view, these findings of the district court, standing alone, are sufficient to establish a "property" interest, for when an institution as a matter of custom establishes a formalized probationary period, followed by employment as a "permanent" employee, reasonable men may fairly conclude that "probationary" means "on trial" and "permanent" means "permanent" and persons in the latter category have a legitimate claim of entitlement to continued employment absent cause. *Thomas* v. *Ward, et al.*, No. 74-1541 (4th Cir., Nov. 24, 1975) p. 6. See also *Perry* v. *Sindermann*, 408 U.S. at 602.

The "dismissal" of "permanent employees" of the City of Marion is governed by Article II, Section 6, of Marion's Personnel Ordinance (quoted at pp. 6-7, *supra*). That ordinance establishes four types of cause for which a "permanent" employee "may be dismissed by the City Manager":

(1) failure "to perform work up to the standard of the classification held,"

(2) continued negligence,

(3) continued inefficiency, or

(4) continued unfitness to perform his or her duties (see pp. 6-7, *supra*).

The ordinance's explicit enumeration of the causes for which a permanent employee may be discharged is dispositive of the "property" issue at bar. *Arnett* v. *Kennedy*, 416 U.S. at 134, 181, 209 (Opinions of Powell, J., joined by Blackmun, J.; White, J.; and Marshall, J., joined by Douglas and Brennan, JJ.).

The Marion ordinance not only establishes the "causes" for discharge but also reinforces the job security of "permanent" employees by further providing that if a "permanent employee's" work "is not satisfactory over a period of time" he shall be "notified of the way his work is deficient and what he must do if his work is to be satisfactory." The plain implication of this provision is that, even where the City has sufficient cause to dismiss a "permanent" employee, it will first give the employee fair warning of his shortcomings and an opportunity to conform with the standards required by the City.

In sum, the ordinance identifies the causes for which a permanent employee may be discharged, and further provides for fair warning and an opportunity to conform to standard before the discharge can be effectuated. Nothing in the ordinance suggests that "permanent" employees are subject to discharge at the pleasure of the employer or for no reason at all. Judge Winter concluded that "I can only read this ordinance as giving plaintiff a right to continuing employment unless there be good cause for his dismissal" (Pet. App. 27). Clearly then, the ordinance establishes for Bishop a "legitimate claim of entitlement to continued employment absent 'sufficient cause'" and the judgment below should be reversed.

III. The Court of Appeals, at a Minimum, Should Have Vacated the Judgment and Remanded the Liberty Issue for Determination in Light of Goss.

Respondents initially advised petitioner in writing that he was discharged because of unsatisfactory work and failure to attend training schools, but that statement did not fully reflect the nature and extent of the grounds relied upon by respondents for summarily terminating Bishop (A.6, 14). In support of respondents' motion for summary judgment, the Chief of Police of the City of Marion averred that "Officer Bishop was relieved of his duties because of insubordination, failure to attend training classes, and acts unsuited to a police officer" (A.33-34).

We show below that Bishop's constitutionally protected right to "liberty" was abridged without due process, for respondents' action in summarily dismissing Bishop for cause—*i.e.*, on grounds of "insubordination" and conduct "unsuited to a police officer"—constituted state action that "could seriously" stigmatize petitioner and "interfere" with his opportunities for other employment as a police officer. *Goss* v. *Lopez*, 419 U.S. 565, 574-75 (1975), interpreting and

applying *Board of Regents* v. *Roth, supra,* at 573; and *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971). In our view, the undisputed facts of record showing the alleged reasons for discharging Bishop establish as a matter of law that he is, or at least could be, seriously stigmatized by this state action and that his employment opportunities could be seriously interfered with. The court of appeals, sitting en banc, should have reversed the district court's judgment or, at a minimum, vacated that judgment with instructions to determine the liberty issue in light of this Court's then recent ruling in *Goss.*

A. The Standard

In *Roth,* this Court drew on a great body of procedural due process cases in arriving at its conclusions that "liberty" encompasses "the right of the individual . . . to engage in any of the common occupations of life . . ." (408 U.S. at 572), and that a discharge from public employment under circumstances which (1) "might seriously damage" an individual's "standing and associations in his community" or (2) "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities" is a deprivation of liberty (*id.* at 573-74).[9]

[9] In *Roth,* the Court held that respondent, a professor whose one-year contract had been allowed to lapse, suffered no deprivation of liberty: "It stretches the concept too far to suggest a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Board of Regents* v. *Roth,* 408 U.S. at 575. The Court rejected the proposition that the non-retention of Roth in one job "taken alone, might make him somewhat less attractive to some other employers" and thus would establish a "foreclosure of opportunities amounting to a deprivation of 'liberty' " (*id.* at 574, n.13). The Court, however, assumed arguendo that a " ' substantial adverse effect' " on Roth's career interests would "constitute a state-imposed restriction on liberty . . ." (*id.*).

This Court applied *Roth's* principles in *Goss* v. *Lopez,* 419 U.S. 565 (1975). There, students who allegedly engaged in demonstrations and other disturbances during school were suspended for ten-day terms without notice or hearing. This Court concluded that the school administrator's actions impinged upon the students' property and liberty interests. In holding that the students' liberty interests were infringed, the Court said:

> "School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges *could seriously damage* the *students' standing* with their fellow pupils and their teachers *as well as interfere with later opportunities* for higher education and employment." (419 U.S. at 574-75; emphasis supplied).

As the Court's language in *Goss* makes clear, in determining whether a liberty interest is implicated, the courts should test the nature of the state-action (here the discharge) and the underlying grounds therefor against the *possibility* of serious damage to the individual's standing in his community and against the *possibility* of serious interference with later employment opportunities. Thus, in *Goss,* the Court concluded that the state action "*could* seriously damage" or "interfere" with the petitioner's standing and employment opportunities.[10]

[10] In *Arnett* v. *Kennedy,* 416 U.S. at 134, 157, Mr. Justice Rehnquist stated "that liberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which *could* wrongfully injure the reputation of an employee" (emphasis supplied). See *Wellner* v. *Minnesota State Junior College Board,* 487 F.2d 153, 155 (8th Cir. 1973) (liberty standard is whether " 'government conduct likely will . . . impose

The subjunctive cast of the liberty standard is necessary because, at the time public officials are weighing whether they must offer a hearing, the impact of the officials' adverse action upon the individual has not yet resulted. Moreover, the full impact of stigmatization or employment foreclosure may not occur for some years after the public officials have taken their action or the court has decided the liberty issue. Finally, it is the likelihood, rather than the actuality, of injury that triggers due process, for the very purpose of a due process hearing is to *prevent* injury to an employee through unfair stigmatization. It would be inconsistent with this rationale to require the employee to actually suffer such injury before he can invoke the protections of the due process clause. Thus, the issue here, as in *Goss,* is whether reasonable men would conclude, at the time the discharge is implemented, that the city officials' determination to discharge Bishop on grounds of insubordination and conduct unbecoming a police officer "could seriously damage" his standing in the community or "could seriously . . . interfere" with "later opportunities for . . . employment" as a police officer.

B. Respondents' Summary Dismissal of Bishop on Grounds of Insubordination and Conduct Unsuited to a Police Officer Could Seriously Damage or Interfere with his Employment Prospects.

In light of *Goss,* it is clear that respondents' summary dismissal of Bishop did implicate the officer's

a stigma . . . that will foreclose future opportunities to practice his profession' "); *McNeill* v. *Butz,* 480 F.2d 314, 320, n.4 (4th Cir. 1973) (dismissal "might effectively foreclose a significant percentage" of job opportunities in community); *Christhilf* v. *Annapolis Emergency Hospital Association,* 495 F.2d 174, 178 (4th Cir. 1974) (denial of physician's hospital privileges "might effectively foreclose" his practicing in area).

"liberty" interest (Pet. App. 17-18).[11] Bishop was not suspended for ten days. He was fired. The utilization of that sanction against a permanent employee implies far more serious misconduct or failings than does the suspension of a student or an employee for a short period of time.[12] Furthermore, unlike Goss and his colleagues, Bishop cannot reasonably expect that prospective employers would excuse or minimize his alleged misconduct as acts of adolescent exuberance. On the contrary,

> "One must acknowledge what seems to be an accepted, if regrettable, fact of life: Removal from government employment for cause carries a stigma that is probably impossible to outlive. Agency personnel officers are generally prepared to concede, as employee spokesmen claim, that it is difficult for the fired [federal] government worker to find employment in the private sector." [13]

[11] *Goss* was decided nine days before the court of appeals, sitting en banc, affirmed the district court's judgment by an evenly divided vote of the court (Pet. App. 30).

[12] See Mr. Justice Powell's dissenting opinion in *Goss* v. *Lopez,* 419 U.S. at 589.

[13] Merrill, "Report in Support of Recommendation 72-8, Procedures for Adverse Actions Against Federal Employees," in 2 *Recommendations and Reports of the Administrative Conference of the United States,* 1007, 1015 (1972), quoted by Mr. Justice Marshall, dissenting in *Arnett* v. *Kennedy,* 416 U.S. 134, 213-14 (1974). The Report also appears, in slightly revised form, as Merrill, "Procedures for Adverse Actions Against Federal Employees," 59 *Va. L. Rev.* 198 (1973). See also Comment, "Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees," 19 *UCLA L. Rev.* 1052, 1065-66 (1972):

> "What must be recognized is that, under present conditions, a dismissal from public employment—regardless of its justification—is as potentially damaging to an individual's future employability as the affixing of a defamatory label. A dis-

Furthermore, the ostensible grounds relied upon by respondents in discharging Bishop are particularly serious in light of the requirements and responsibilities of his chosen profession. Commentators emphasize that internal discipline within a police force is necessary in order to control the authority exercised by and the discretion vested in the individual officer and to make the officer accountable to his superiors and to the public.[14] It is also widely recognized that an officer must have sound judgment and emotional stability.[15] Thus, given the requirements of the police profession, it is clear that discharge of an officer on grounds of "insubordination" could seriously interfere with his career opportunities in law enforcement. See, *Simmonds* v. *Government Employees' Service Commission*, 375 F. Supp. 934, 937-38 (D. V.I., 1974) (discharge for insubordination and continued failure to comply with regulations implicates liberty); *Morris* v. *Board of*

missal from public employment carries with it at least the intimation of incompetency or dishonesty. A dismissed public employee, therefore, may find the doors to reemployment especially hard to open. The employment applicant who is unable to respond positively to the inevitable question concerning past employment experience is seriously handicapped in his search for economic security."

[14] See, *e.g.*, American Bar Association Project on Standards for Criminal Justice, *Standards Relating to the Urban Police Function*, § 4.2 and Commentary, § 5.1 and Commentary (approved draft 1973) [hereinafter ABA Standards]; National Advisory Commission on Criminal Justice Standards and Goals, *Report on Police*, Standards 1.2 to 1.3 and Commentary (1973) [hereinafter Advisory Commission]; President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police*, at 25-35 (1967) [hereinafter President's Commission].

[15] See, *e.g.*, ABA Standards, *supra*, note 14, § 7.3 and Commentary; Advisory Commission, *supra*, note 14, Standard 13.5 and Commentary; President's Commission, *supra*, note 14, at 125-26.

Education of Laurel School District, No. 4684 (D. Del., Aug. 4, 1975) p. 53 (nonrenewal for "persistent failure" to comply with administrative directives implicates liberty).

Moreover, Bishop's discharge was allegedly based not only on "insubordination," but also on conduct "unsuited to a police officer." This vague and amorphous charge (for which no particulars were given[16]) provides an especially invidious stigma that may seriously damage Bishop's efforts to secure future employment as a police officer, for such a charge is often used by public employers to signify immoral conduct or corrupt practices[17] which would automatically bar an individual from employment as a police officer.

The common law of defamation provides further confirmation that the ostensible grounds for Bishop's discharge could seriously interfere with his efforts to pursue his chosen career. As early as 1731, it was said that "[t]he law has always been very tender of

[16] In support of this ground for discharge, the Chief of Police averred that "a verbal complaint was filed against him [Bishop] by Sergeant Arrowood concerning Bishop's acts which were unsuited to a police officer" (A. 33).

[17] See *Coursey* v. *Greater Niles Publishing Co.*, 82 Ill. App. 2d 76, 227 N.E.2d 164 (1967), where a charge of conduct tending to bring police department into disrepute meant immoral advances by officer to teenage girl; and *Appeal of Baker*, 409 Pa. 143, 185 A.2d 521 (1962), and *Souder* v. *Philadelphia*, 305 Pa. 1, 156 A.245 (1931), where "conduct unbecoming an officer" meant involvement with criminal activities or figures. See also *Fisher* v. *Snyder*, 476 F.2d 375 (8th Cir. 1973), where public authorities used the label "conduct unbecoming a teacher" to mean that a 55 year old teacher had engaged in sexual relations with much younger men); and *Bence* v. *Breir*, 501 F.2d 1185 (7th Cir. 1974), where court held that the standard, conduct unbecoming a policeman, is void for vagueness.

the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person." *Harman* v. *Delany*, 2 Strange 898, 93 Eng. Rep. 925 (1731). Statements that discredit a person in his chosen calling, including police work, are actionable per se either in libel or slander without proof of special damages. See, *e.g.*, *Commercial Tribune Publishing Co.* v. *Haines*, 228 Ky. 483, 15 S.W.2d 306 (1929) (libelous per se to accuse motorcycle policemen of neglecting duty by loitering and talking to women); *Holland* v. *Flick*, 212 Pa. 201, 61 A. 828 (1905) (libelous per se to charge detective with cowardice); *Scougale* v. *Sweet*, 214 Mich. 311, 82 N.W. 1061 (1900) (libelous per se to accuse sheriff of intentional neglect of duty); *Walsh* v. *Miami Herald Publishing Co.*, 80 So.2d 669 (Fla. 1955) (libelous per se to say that policeman in court gave testimony contradicting his own report of an accident). See generally *Annot.*, 53 A.L.R.2d 8 (1957). As Dean Prosser has explained, the reason that courts make such statements actionable without proof of special damages is that "[t]he likelihood of 'temporal' damage in such a case is sufficiently obvious . . . ." W. Prosser, *Law of Torts*, § 112 at 757 (4th ed. 1971).[18]

Finally, there is, at a minimum, a substantial likelihood that prospective employers will learn that Bishop was discharged on grounds of "insubordination" and

[18] The fact that those who defame police now may enjoy a qualified privilege arising under the First Amendment, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971), does not detract from the injury to the policeman's career interests, or make it less appropriate for the officer to have the opportunity to set the record straight in a due process hearing.

conduct "unsuited to a police officer." Generally, prudent employers inquire as to an applicant's prior work experience and reasons for terminating any prior employment relationships. In the field of law enforcement, it is standard practice for police departments to conduct background investigations of applicants for police work.[19] The President's Commission on Law Enforcement and Administration of Justice reported in its *Task Force Report: The Police*, p. 129 (1967), that a then recent study by the National League of Cities showed that "278 of the 284 cities surveyed reported that a background investigation was employed to investigate the character of police applicants."[20] More recently, the U.S. Department of Labor, Bureau of Labor Statistics, reported that "[b]ecause personal characteristics such as honesty, good judgment, and a sense of responsibility are especially important in police work, candidates are interviewed by a senior officer at police headquarters, and their character traits and background are investigated." U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 1974-75 Edition* (Bulletin 1785) p. 186. See also Circuit Judge Winter's dissenting opinion (Pet. App. 28).

[19] The background investigation of the applicant for police work is widely recognized as an important part of the selection process. ABA Standards, *supra*, note 14, § 7.3, Commentary, at 199-200; Advisory Commission, *supra*, note 14, Standard 13.5, Commentary, at 339-40; President's Commission, *supra*, note 14, at 129.

[20] Compare *Goss* v. *Lopez*, 419 U.S. at 575 n.7, where the Court noted that "Appellees assert in their brief that four of 12 randomly selected Ohio colleges specifically inquire of the high school of every applicant for admission whether the applicant has ever been suspended. . . . Appellees also contend that many employers request similar information."

The short of the matter is that, in discharging Bishop for "insubordination" and conduct "unsuited to a police officer," respondents have taken measures that could seriously interfere with Bishop's career as a police officer and his prospects for future employment.

C. The Court of Appeals Should Have Vacated the District Court Judgment for Consideration in Light of Goss.

The district court stated that "[h]ere, as in *Roth*, there is no suggestion whatever that the plaintiff's loss of his 'good name, reputation, honor or integrity' is at stake. There is nothing involved except one job with the city, and the plaintiff remains free to seek another job" (Pet. App. 17). Thus, the court concluded that Bishop's "dismissal did not result in deprivation of his liberty in any form" (*id.* at 22), and the court of appeals affirmed. In our view, it is unclear whether the district court's statements are intended to mean that Bishop had not adequately raised a "liberty" issue or are meant to be a ruling against Bishop on the merits of his liberty interest.[21]

Judge Winter, dissenting, concluded that *Roth* and *Sindermann* "not only foreclosed the entry of summary judgment for defendants, but require that, if summary disposition is to be made, plaintiff should be adjudged entitled" to summary judgment (Pet. App. 26). As he pointed out, petitioner was dismissed, *inter alia*, for "insubordination" and "conduct unsuited to a police officer" and "[a]ccusations of this nature made against one engaged in the occupation of a law enforcement officer manifestly have a severe adverse impact

[21] While the motions and affidavits of the parties do not mention the impact of petitioner's discharge on his good name or career interests, petitioner's complaint and motion for summary judgment are broad enough to raise the liberty issue (A. 8, 36-37).

upon future employment opportunities, and it can be reasonably expected that defendants would disclose these reasons upon the request of a person considering plaintiff's employment who inquired of the respects in which plaintiff's work had been found unsatisfactory" (Pet. App. 28).

This Court's decision in *Goss* fully supports Judge Winter's conclusions (see pp. 13-15, *supra*). Accordingly, if this Court reaches the liberty issue, it should vacate the judgment below with instructions that the liberty issue be decided in light of *Goss*.

CONCLUSION

For the reasons stated in Part II of this brief, this Court should reverse the judgment of the court of appeals and order that summary judgment be entered for plaintiff. If, however, the Court decides the property issue adverse to petitioner, then the Court should vacate the judgment below and remand the liberty issue for consideration in light of *Goss*.

Respectfully submitted,

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